**Everfresh Beverages f/k/a EB Acquisition Corp., successor *and* Local 51, International Brotherhood of Teamsters, AFL–CIO.** Case 7–CA–38325

March 31, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The issue presented in this case[1] is whether the judge correctly found that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings[2] and conclusions and to adopt the recommended Order as modified.[3]

The Respondent asserts that it did not have an obligation as a successor employer to bargain with the Union because, at the time of the Union's bargaining demand, it did not employ a substantial and representative complement of its intended work force. We agree with the judge's rejection of this argument. At the time of the Union's bargaining demand, the Respondent had no objective basis for reasonably expecting that its workforce would soon expand beyond its initial complement of 19 unit employees, all of whom had formerly been employed by the Respondent's unionized predecessor. Rather, the Respondent's officials were merely hopeful that sales would ultimately rebound to justify hiring up to a peak employment level of 60 to 70 employees. Regardless of whether these hopes ultimately were realized (in fact, they were not) or whether the work force subsequently expanded to some extent, the Respondent did not present a legitimate basis for deferring, beyond the date of the Union's demand, the determination of whether the successorship obligation had attached. *Delta Carbonate*, 307 NLRB 118, 119 (1992), enfd. 989 F.2d 486 (3d Cir. 1993); *M.U. Industries*, 284 NLRB 388, 389 (1987). Accordingly, the Respondent's obligation to recognize and bargain with the Union dates from the Union's March 20, 1996 demand.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Everfresh Beverages f/k/a EB Acquisition Corp., successor, Warren, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Failing and refusing to recognize and bargain with Local 51, International Brotherhood of Teamsters, AFL–CIO as the exclusive representative in the following appropriate unit:

> "All production and maintenance employees employed by Respondent at its Warren, Michigan facility, but excluding office clerical employees, guards and supervisors as defined in the Act."

2. Substitute the following for paragraphs 2(b) and (c).

"(b) Within 14 days after service by the Region, post at its Warren, Michigan facility, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 22, 1996.

"(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply."

[1] On November 18, 1996, Administrative Law Judge William F. Jacobs issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

"[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading 'Posted by Order of the National Labor Relations Board' shall read 'Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.'

*Ellen Rosenthal, Esq.*, for the General Counsel.
*G. Paris Sykes Jr., Esq.*, of Atlanta, Georgia, for the Respondent.
*Wayne Rudell, Esq.*, of Dearborn, Michigan, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

WILLIAM F. JACOBS, Administrative Law Judge. This case was tried before me on September 18, 1996,[1] in Detroit, Michigan. Local 51, International Brotherhood of Teamsters, AFL–CIO (the Union) filed the original charge in Case 7–CA–38325 on March 22. Complaint[2] issued on May 24 and was amended September 11. The amended complaint, in relevant part, alleges that Everfresh Beverages f/k/a EB Acquisition Corp. (the Respondent, the Company, or the Employer) unlawfully failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees. In its answer, Respondent denies the commission of any unfair labor practices.

All parties were represented at the hearing and were afforded full opportunity to be heard and to present evidence and argument. The General Counsel and Respondent filed briefs. On the entire record, my observation of the demeanor of the witnesses and after giving due consideration to the briefs, I make the following

### FINDINGS OF FACT[3]

At all material times through November 17, 1995, Everfresh Beverages, Inc. (Everfresh) was engaged in the business of bottling and nonretail selling of beverages at its Warren, Michigan facilities.

On November 17, 1995, Everfresh filed under Chapter 11 of the U.S. Bankruptcy Code. Thereafter, Everfresh was granted authority as debtor-in-possession (D.I.P.) to continue its business operations and did so, without interruption.

On February 7, Respondent entered into an asset purchase agreement which required Everfresh, until the final closing of the sale, to continue its business consistent with past practices, preserving its relationship with customers and suppliers and retaining the services of its employees. The closing took place on March 15 and the transfer of ownership was accomplished.

About 2 p.m. on Friday, March 15, Plant Manager Mark Hinebaugh called the employees into the conference room. There, Plant Personnel Manager Michele Simon and National Beverage Corporation's[4] human resources director, Richard McKenzie, told them that the plant had been sold to National Beverage. They advised the employees that they were all terminated from Everfresh but, if they would come in the following day and fill out an application, they might possibly be hired. McKenzie explained that the new owner intended to continue to operate the plant; that after closing the plant it would reopen it as soon as possible and invited all employees who wished to do so, to apply for employment. McKenzie mentioned that interviews would be conducted the following morning at 9 a.m. McKenzie testified that Respondent wanted to open the doors on Monday, March 18 and start operations immediately, running the plant, when opened, exactly as it had been run the previous Friday. As of March 15, there were 28 employees in the production and maintenance unit, 22 of them actually working that day. The D.I.P. ceased operations at the Warren plant that day.

McKenzie testified that Respondent had two rehiring plans, one short term, the other long term. The short-term plan involved getting the doors open as quickly as possible and continuing the operation already extant with the same employees. The long-term plan involved expanding the operation, Respondent's sales, production and number of employees to between 60 and 70. This, Respondent hoped, would be accomplished by midsummer.

To be open immediately, Respondent would have to rehire enough employees to man two lines but not more because it did not have enough raw goods on hand. Apparently there were enough raw goods on hand to meet immediate production requirements as reflected by current sales. Respondent expected to have the two lines up and running by Tuesday or Wednesday of the following week.

According to McKenzie, the expectation of having 60 to 70 employees working by midsummer was based on four factors:

1. The Company's past operations. McKenzie testified that he analyzed the Company's records and came up with an average monthly head count which supported his long-range projection.

McKenzie's testimony concerning his analysis of company records was not, however, supported by any documentation.

2. Peter Vitulli's forecast. Vitulli advised McKenzie as to how soon he felt the Company's lost business could be recovered.

Vitulli testified as to the reasons why he forecasted success for the Company but offered no concrete evidence, no documentation, and no foundation on which any legitimate forecast or projection could possibly be based.

3. Mark Hinebaugh's economic analysis. Hinebaugh, the plant manager, had reported to McKenzie that he thought that there was a very big "pent-up demand;" "that there would be a heavy rush of people who had been waiting to buy the product and hadn't bought it because it had been in bankruptcy." McKenzie explained that "perhaps" old customers who had not purchased the product recently because they could not get terms, would return once again, if they could get credit rather than having to pay cash. Hinebaugh did not testify.

4. Robert Rayes, president of the Union and other people's optimism. McKenzie testified that he relied on the optimism of people who knew the business when he projected the need for an estimated 60 to 70 employees by midsummer. Rayes did not testify.

On Saturday, March 16, about 8 a.m., McKenzie interviewed Hinebaugh, and Simon and tentatively hired them subject to receiving their drug screening results. The three subsequently interviewed supervisors and made similarly conditioned offers of employment. They then interviewed the

[1] Hereinafter, all dates are in 1996 unless noted otherwise.

[2] An order consolidating cases, consolidated complaint and notice of hearing issued on May 24 consolidating this case with Case 7–CA–37917. These cases were subsequently severed by order dated September 11, 1996.

[3] In its answer, Respondent concedes jurisdiction and the status of the Union as a labor organization.

[4] Respondent's parent corporation.

rank-and-file employees as they applied, advising them of the terms and conditions of employment and telling them that they would be contacted within the next 24–48 hours if Respondent decided to hire them.

On the afternoon of Saturday, March 16, McKenzie, Hinebaugh, and Simon met to decide which of the interviewees would be hired. They then instructed various supervisors to start making calls to those individuals chosen as potential hires and have them report to the plant Monday morning, March 18, to review new-hire information and fill out the necessary forms. Respondent contacted 18 employees that day, all of whom had still been employed by Respondent as of the previous day.

On March 18, Respondent began operations at the Warren plant with the 18 employees it had contacted on March 16, all employees in the unit represented by the Union as of March 15 and before. Employed also, on March 18, were five managerial and supervisory personnel previously employed by Respondent's predecessor on March 15. The 18 unit employees, after meeting with management and signing the required papers, returned to their old jobs, identical to those they held as of March 15.

On March 18, Hinebaugh contacted Rafel White, an ex-employee of Everfresh, told him that National Beverage Company had bought Everfresh, and asked him if he would come back and work for Respondent. White, who had been an employee of Everfresh for 8 years, had quit a few months before and taken a job with an interim employer. As of Hinebaugh's March 18 call to him, White was unemployed. White accepted Hinebaugh's invitation and agreed to come in and file an application. He did so and was back as a full-time employee with Respondent as of March 21.[5]

As of March 19, Respondent had a production line up and running which was better than anticipated. All of the employees were ex-employees of Everfresh. The short-term plan was effectuated within the first 2 weeks.

On March 20, Robert Rayes wrote identical letters to McKenzie and Hinebaugh advising them that the Union represented all of Respondent's employees, demanding recognition, and requesting that negotiations commence immediately.

On March 21, McKenzie replied on behalf of Respondent, stating that the number of employees hired since March 16 did not, at that time, constitute a majority of the employees who would eventually be employed by the Company. On this basis, McKenzie advised the Union that its request for recognition was premature and that the Company was declining recognition and refusing to commence negotiations at that time. The letter concluded with the statement that at such time as its hiring process had achieved the anticipated substantial and representative complement of bargaining unit employees at the Warren location, it would make an appropriate response to the Union. Meanwhile the Union's request for recognition would be treated as a continuing one.

[5] White's situation is in issue only insofar as it affects the majority status of the Union during later periods. It is not relevant to the findings as found herein and, for that reason, is not discussed further.

## I. CONCLUSIONS

### Successorship

In preparation for the hearing in this case, the parties offered into evidence a number of stipulations. These stipulations were supported by the testimony of a number of witnesses. The stipulations are as follows:

1. Everfresh Beverages, f/k/a EB Acquisition Corp. referred to in the Complaint and Answer as "Respondent EB," purchased certain assets from Everfresh Beverages, Inc., a debtor-in-possession (hereafter "D.I.P."), on March 15, 1996, as more particularly described in an asset purchase agreement between those parties dated February 7, 1996, and Bill of Sale dated March 15, 1996, which will be offered as joint exhibits at the hearing in this matter.

2. Respondent D.I.P. ceased operations at the plant involved in the asset purchase agreement located at 6600 East Nine Mile Road, Warren, Michigan, 48091, on March 15, 1996, and Respondent EB began operation of the plant involved in the asset purchase, located at 6600 East Nine Mile Road, Warren, Michigan, 48091, on March 18, 1996, with employees it began hiring on March 16, 1996.

3. Respondent EB's business operations at the plant in Warren, Michigan are essentially the same as those of D.I.P. since March 15, 1996.

4. Respondent EB uses the same plant as D.I.P. in Warren, Michigan.

5. Substantially the same jobs exist at Respondent EB's Warren, Michigan plant under the same physical working conditions as existed with D.I.P.

6. The wages and benefits and other terms and conditions of employment of employees of Respondent EB at its Warren, Michigan plant were initially established by it prior to hiring its work force, were communicated to applicants at the time they were employed as a condition of employment, and are different from those which had been paid and provided by D.I.P. prior to March 15, 1996, except for shift hours, and the wage rates of employees previously employed by D.I.P. whose wage rates exceeded the wage scale established by Respondent EB, which remained the same.

7. All of the same supervisors who had been employed by D.I.P. at the Warren, Michigan plant on March 15, 1996 have been employed by Respondent EB as supervisors since it began its operation on March 18, 1996. In addition, Respondent has hired three supervisors who were not employed as supervisors by D.I.P. but were employed by D.I.P. as bargaining unit employees.

8. All of the machinery, equipment and methods of production are used at the Warren, Michigan plant by Respondent EB as were used by D.I.P. except that Respondent EB has not to the present time used the equipment on one production line.

9. The same product is manufactured for sale by Respondent EB as was manufactured by D.I.P. at the Warren, Michigan plant.

10. The product manufactured by Respondent EB at the Warren, Michigan plant is being sold to approximately two-thirds of the customers that had been customers of D.I.P. for product manufactured by it at the plant prior to March 15, 1996, which customers are drawn from the same basic body of customers of D.I.P., and are located in the same geographic area.

I find that these stipulations, considered alone or with the supporting testimony of the General Counsel's witnesses, are sufficient to warrant the conclusion that Respondent is the successor to Everfresh Beverages, Inc.[6]

### II. THE EXPANDING UNIT DEFENSE

The record in this case is totally devoid of any concrete or substantive evidence to support Respondent's claim that it honestly had reason to believe the unit of employees represented since 1965 by the Union was expanding. There is no documentation that sales were increasing or were expected to increase. Nothing to indicate a firm foundation on which to base a legitimate projection requiring increased production and the hiring of additional employees. McKenzie's alleged projection was not a projection at all but an exercise in blind faith or, at best, optimistic hope that failure could magically be converted into success by mere wishful thinking. Respondent's refusal to recognize and negotiate with the Union as the designated exclusive collective-bargaining representative of its employees under the circumstances of this case cannot be countenanced and is clearly in violation of Section 8(a)(5) and (1) of the Act.[7]

### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, I shall recommend that it cease and desist therefrom and from infringing in any like or related manner on its employees' Section 7 rights and that it take certain affirmative action designed to effectuate the policies of the Act.

### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. All production and maintenance employees employed by Respondent at its Warren, Michigan facility, but excluding office clerical employees, guards and supervisors as defined in the Act constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
4. By failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

### ORDER

The Respondent, Everfresh Beverages, Warren, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Local 51, International Brotherhood of Teamsters, AFL–CIO as the exclusive collective-bargaining representative of the employees in the appropriate unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, meet and bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit.

(b) Within 14 days after service by the Region, post at its facility in Warren, Michigan plant, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuously located places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

### APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to recognize and bargain with Local 51, International Brotherhood of Teamsters, AFL–CIO as the exclusive collective-bargaining representative of employees in the appropriate unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize, meet, and bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

All production and maintenance employees employed by us at our Warren, Michigan facility, but excluding office clerical employees, guards and supervisors as defined in the Act.

EVERFRESH BEVERAGES F/K/A EB ACQUISITION CORP., SUCCESSOR

[6] *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987); and *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

[7] *M.U. Industries*, 284 NLRB 388 (1987); and *Delta Carbonate*, 307 NLRB 118 (1992), enfd. 989 F.2d 486 (3d Cir. 1993).